"There can be no such thing as a partnership as to third persons, when there is none as between the parties themselves, and third persons have not been misled by concealment of facts or by deceptive appearances."

It is generally conceded that there may be, as in the principal case, a partnership between persons who contemplate but a single venture, such as the shipment and sale of but one lot of goods, or the joint purchase and sale of but one chattel or one piece of land, but there must be clear evidence of an intent to create the rights and obligations ordinarily incident to partnership.[15] There are also numerous cases holding that there may be a partnership, though one party furnish all the capital.[16] It is important to consider, however, in such case, whether the capital is risked in the business, or is to be repaid at all events, in determining whether the money is furnished as partnership capital or merely as a loan.[17]

In our principal case the court intimates that there is a difference in Georgia between what constitutes a partnership as to third persons, and as between the parties themselves; we are not told clearly what would be sufficient to indicate a partnership as to third persons, but "as among partners, the extent of the partnership is determined by the contract and their several interests."[18] It is pointed out that there was here a joint enterprise, a joint risk, a joint sharing of expenses, and a joint interest in profits and losses,—allegations at least sufficient to withstand a general demurrer. It would seem clear either under the "agency test," or having a regard to the legal intent of the parties, that the agreement was one of partnership, and that the plaintiff was entitled to an accounting.

H. A. L.

TORT—NEGLIGENCE OR NUISANCE—An owner of land who causes work to be done thereon by an independent contractor is not liable to third parties for injuries received due to the negligent manner in which such work was done,[1] yet if the nature of the work was such as to result in a dangerous or unsafe condition

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[15] DeBerkom v. Smith, 1 Esp. 29 (Eng., 1793); Purdy v. Hood, 5 Martin N. S. (La., 1827); Solomon v. Solomon, 2 Ga. 18 (1847); *In re* Warren, 29 Fed. Cas. No. 17191; Scule v. Hayward, 1 Cal. 395 (1850); 260 Hogsheads of Molasses, 24 Fed. Cas. No. 14296 (1866); Hill v. Sheibley, 68 Ga. 556 (1882); Commonwealth v. Arnheim, 3 Pa. Sup. 104 (1896).

[16] Pawsey v. Armstrong, 18 Ch. Div. 698, 706 (1881); Emanuel v. Crane, 14 Ala. 303 (1848); Brownlee v. Allen, 21 Mo. 123 (1855); Kuhn v. Newman, 49 Ia. 424 (1878); Pierce v. Shippee, 90 Ill. 371 (1878); Couch v. Woodruff, 63 Ala. 471 (1879); Tyler v. Scott, 45 Vt. 261 (1873).

[17] 22 Amer. & Eng. Cyc. of Law; 2d Edition; p. 34, and cases there cited.

[18] Civil Code of Ga., Sec. 3156.

[1] Bloomer v. Wilbur, 176 Mass. 482 (1900): "The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence and the negligent party is the only one to be held." Welfare v. Brighton R. R. Co., L. R. 4 Q. B. 693 (1869); Uggla v. Brohaw, 117 App. Div. 586 (N. Y. 1907).

amounting to a nuisance, the owner of the land cannot escape liability for any consequential harm since he is under a duty to maintain his premises in a reasonably safe condition.[2]

This distinction between liability for a tort of negligence and a tort of nuisance was very forcibly illustrated in a recent New York case[3] where the defendant was sued for injuries to a passerby on the highway caused by the falling of an advertising sign which had been erected by an independent contractor. The plaintiff was given a verdict on the theory that, as the work had been negligently constructed, the defendant was guilty of maintaining a public nuisance. In a previous decision[4] on practically the identical statement of facts, the same court found in favor of the opposite party since the plaintiff had endeavored to establish his ground of recovery upon the defendant's failure to have the work properly completed.

In order to bind an owner of land for the negligence of one whom he employs to do work thereon, it must be clearly shown that the relation of master and servant existed.[5] The test of this relationship is the right of control.[6] It is a question whether the employee represents his employer as to the result of the work only or as to the means as well as the result.[7] If the employee is subject to the control of the employer as to the means, he is not an independent contractor,[8] and the negligence of the employee may be imputed to his employer.[9] This same rule applies, even where the one undertaking to do the work is an independent contractor, when the object of the employment is inherently or intrinsically dangerous[10] or wrongful in itself[11] since the duty of care in such

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[2] Marsh v. Brewing Co., 92 Minn. 182 (1904); Garland v. Toune, 55 N. H. 55 (1874): "The distinction appears to be that when work is being done under a contract, if an accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it." Hole v. R. R. Co., 6 H. & N. 488 (1861); Dickinson v. the Mayor, 92 N. Y. 584 (1883).

[3] McNulty v. Ludwig & Co., 13 N. Y. Suppl. 84 (1912).

[4] McNulty v. Ludwig & Co., 125 App. 291 (N. Y., 1908).

[5] Hole v. R. R., *supra.*

[6] Vosbeck v. Kellogg, 78 Minn. 176 (1899); Connor v. P. R. R., 24 Pa. Sup. 241 (1904).

[7] Miller v. Merritt, 211 Pa. 127 (1905).

[8] McNeil v. Steel Co., 207 Pa. 493 (1904); Singer Mfg. Co. v. Rohn, 132 U. S. 518 (1889).

[9] Street Ry. Co. v. Brown, 49 Mich. 153 (1882); Downey v. Min. Co., 24 Utah 431 (1902); Young v. Smith & Kelly Co., 124 Ga. 475 (1905); Ry. Co. v. Hudgins, 100 Pa. 409 (1902).

[10] Sullivan v. Dunham, 35 App. Div. 342 (N. Y., 1898); Gaslight Co. v. Norwalk, 63 Conn. 495 (1893); R. R. Co. v. Morey, 47 Ohio 207 (1890); Wetherbee v Partridge, 175 Mass. 185 (1900).

[11] Rex v. Medley, G. C. & P. 292 (1834); Waller v. Lasher, 37 Ill. App. 609 (1890).

instances cannot be shifted from the instigator of the operations.[12] In ordinary circumstances, however, where the work has been delegated to an independent contractor, the employer is not responsible for the latter's negligence,[13] provided, of course, he has exercised all reasonable care and judgment in the selection of the contractor.

On the other hand where one creates a nuisance no degree of care[14] will excuse him, for his duty to the public is absolute.[15] The absence or presence of negligence in no way alters the creator's position,[16] and his liability for the negligence of the independent contractor under such circumstances is founded upon his own act in causing the nuisance to come into existence.[17] In the principal case the fact that the sign encroached upon the highway, in violation of a local ordinance, and fell to the ground, thereby injuring the plaintiff, was sufficient evidence that it was not only not properly and securely fastened, but also constituted a public nuisance.[18] It is a situation in which the doctrine of *res ipsa loquitur* may be justly applied.[19]

Just where the line may and can be drawn between these two grounds of liability is invariably a close and difficult question, inasmuch as every nuisance presupposes some degree of negligence. It would seem that the fundamental difference lies in the nature of the work to be performed and the duty thereto attached. Where the work contracted to be done amounts to a nuisance the duty arises at once and there is a continuing liability which cannot be transferred to one who may have been the means whereby the nuisance was created. But if the acts to be done may be safely performed in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the one executing such acts is liable, provided the instigator of the acts exercised due care and precaution in his

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[12] R. R. v. Mitchell, 107 Md. 600 (1908); Homan v. Stanley, 66 Pa. 464 (1865); Ainsworth v. Lakin, 180 Mass. 397 (1902).

[13] Forsythe v. Hooper, 11 Allen 419 (Mass. 1873); Khron v. Brock, 144 Mass. 516 (1887); Iron Co. v. Cray, 19 Md. App. 565 (1897); Ziebell v. Lumber Co., 33 Wash. 591 (1903); Keip v. Baptist Church, 99 Me. 308 (1904).

[14] Pitcher v. Lennon, 16 Misc. 609 (N. Y., 1896); Kearney v. Ry. Co., L. R. 6 Q. B. 759 (1871); Chauntter v. Robinson, 4 Exch. 163 (1849); R. R. Co. v. Morey, 47 Ohio 207 (1890); McCarrier v. Hollister, 15 S. D. 366 (1902).

[15] Tarry v. Ashton, 1 Q. B. D. 314 (1876); Canfland v. Hardingham, 3 Camp. 398 (1813); People v. Cunningham, 1 Denio 524 (N. Y., 1845); Turnpike Co. v. Rogers, 2 Pa. 114 (1845); Gunter v. Geary, 1 Cal. 462 (1851).

[16] Lamming v. Galusha, 135 N. Y. 239 (1892); Tearney v. Powder Co., 131 Ill. 322 (1890); Sullivan v. Waterman, 20 R. I. 372 (1898).

[17] Holliday v. Telephone Co., L. R. 1 Q. B. 221 (1898); Fisher v. Ruck, 12 Pa. Sup. 240 (1900); Norcross v. Thomas, 51 Me. 503 (1863); Woodman v. Metropolitan R. R., 149 Mass. 335 (1889).

[18] Com. v. Kembel, 30 Pa. Sup. 199 (1906); Valpariso v. Bozarth, 153 Md. 536 (1899); Hearst Pub. Co. v. Spiss, 117 Ill. App. 436 (1904); Dunsback v. Hollister, 49 Hun. 352 (N. Y., 1888); Hockney v. State, 8 Md. 494 (1857).

[19] Cummings v. Furnace Co., 60 Wis. 603 (1884); Murray v, McShane, 52 Md. 217 (1879); Turnpike Co. v. Yates, 108 Tenn. 428 (1902).

selection.[20] In other words, if the work itself created the danger or injury, then the ultimate superior or proprietor is liable to persons injured by a failure properly to guard or protect the work even though the work is intrusted to an independent contractor; and such superior or proprietor cannot shield himself by a plea and proof that the work was so intrusted.[21]

As a final word it might be stated that the whole question comes to the point of when the duty of care arises and ends. It cannot be doubted that the case under discussion falls within the exception as to the liability for maintenance of a nuisance and the fact that the plaintiff was denied recovery in this original suit was due more to faulty pleadings than a denial of his substantive rights.

W. A. W., 2d.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF N. J AND PA. ACTS—VALIDITY OF STATUTORY PRESUMPTION OF WAIVER OF COMMON LAW RIGHTS—A decision of considerable importance was rendered in April by the Supreme Court of New Jersey. In the case of *Sexton* v. *Newark Dist. Tel. Co.*[1] that tribunal, by a unanimous opinion, declared in the clearest terms that the Employer's Liability Act in that state was constitutional. This opinion is of especial interest to the bench and bar of Pennsylvania, since the provisions contained in the Workmen's Compensation Act now before the legislature for consideration are, in their constitutional aspects, practically identical with the New Jersey Act[2] which the decision sustains. It seems worth while, accordingly, to point out just how closely these articles of the Pennsylvania Act resemble the sections involved in the New Jersey one, and to indicate exactly how the constitutionality of the latter were upheld.

In regard to the first section of the Act abolishing certain common law defenses, and which is precisely similar in substance and practically so in form, as far as any question of constitutionality is concerned, with the Pennsylvania statute, the New Jersey court said: "Cases are numerous and we think uniform in holding that the defenses modified or abolished by Section I[3] may be modified or abolished by the legislative power when they relate, as here, to an injury sustained by an employee after the legislative provision becomes effective."[4] And further on in the opinion it

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[20] Tarry v. Ashton, *supra;* Chicago v. Robbins, 2 Black 418 (U. S., 1802); Engle v. Eureka Club, 137 N. Y. 100 (1893); Bibbs Adm. v. R. R., 87 Va. 711 (1891); Young v. Lumber Co., 147 N. C. 26 (1898); Callahan v. R. R., 23 Iowa, 562 (1867).

[21] Water Co. v. Ware, 83 U. S. (16 Wall.) 566 (1872).

[1] Not yet reported.

[2] Act of April 4, 1911.

[3] Act I of proposed Penna. Act.

[4] The New Jersey court, after citing many cases in support of thier conclusion, quoted at length from the opinion in the Second Employer's Liability